Supreme Court, U. S.
FILED
AUG 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1977

No. 78-74

RALPH WAYNE THEIS,

*Appellant,*

v.

CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

## APPELLEE'S MOTION TO DISMISS THE APPEAL FROM THE STATE COURT, OR IN THE ALTERNATIVE TO AFFIRM THE RULING OF THE COURTS BELOW

JANE MACON
City Attorney
City of San Antonio
City Hall
San Antonio, Texas 78205

SAWTELLE, GOODE, DAVIDSON & TROILO, A PROFESSIONAL CORPORATION
ROBERT SAWTELLE
JOHN W. DAVIDSON
RICHARD A. FLUME, JR.
1100 San Antonio Savings Building
San Antonio, Texas 78205

*Attorneys for the City of San Antonio, Acting by and Through Its Water Works Board of Trustees of San Antonio*

Bowne of Houston, Inc. Printed in U.S.A.

## TABLE OF CONTENTS


CITATIONS ..... ii

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED ..... 2

COUNTER-STATEMENT OF THE CASE ..... 2

REASON WHY THE APPEAL SHOULD BE DISMISSED ..... 3

THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION ..... 8

CONCLUSION ..... 11

CERTIFICATE OF SERVICE ..... 12

## TABLE OF AUTHORITIES

**Cases**


Bailey v. Anderson, 326 U.S. 203 (1945) ..... 4

Bowe v. Scott, 233 U.S. 658 (1914) ..... 4

Great Northern R. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1952) ..... 6

Hanson v. Denckla, 357 U.S. 235 (1958) ..... 4

Herndon v. Georgia, 295 U.S. 441 (1935) ..... 6

Lone Star Gas Co. v. Shearer, 157 Tex. 508, 305 S.W.2d 150 (Tex. 1957) ..... 5

Neely v. Eby Construction Co., 386 U.S. 317 (1967) 7, 8, 10

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) ..... 4

Saunders v. Shaw, 244 U.S. 317 (1917) ..... 6, 7

Street v. New York, 394 U.S. 576 (1969) ..... 4

Texas and Pacific Ry. Co. v. Southern Pacific Co., 137 U.S. 48 (1890) ..... 4

Texas State Highway Department v. Fillmon, 150 Tex. 460, 242 S.W.2d 172 (Tex. 1951) ..... 5

Watson v. Glenn Falls Ins. Co., 505 S.W.2d 793 (Tex. 1974) ..... 5


**Miscellaneous**


28 U.S.C. § 2106 ..... 7, 9

Supreme Court Rule 16 ..... 7

Tex. R. Civ. P., Rule 301 ..... 2, 8, 9

Tex. R. Civ. P., Rule 434 ..... 2, 7, 9

Tex. R. Civ. P., Rule 469(e) ..... 5, 7

Tex. R. Civ. P., Rule 483 ..... 6


IN THE

# Supreme Court of The United States

OCTOBER TERM, 1977

---

No. 78-74

---

RALPH WAYNE THEIS,

*Appellant,*

v.

CITY OF SAN ANTONIO, ACTING BY AND THROUGH ITS WATER WORKS BOARD OF TRUSTEES OF SAN ANTONIO,

*Appellee.*

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

---

## APPELLEE'S MOTION TO DISMISS THE APPEAL FROM THE STATE COURT, OR IN THE ALTERNATIVE TO AFFIRM THE RULING OF THE COURTS BELOW

---

The Appellee, City of San Antonio, Acting by and through its statutory agent, the Water Works Board of Trustees of San Antonio, moves the Court to dismiss the appeal hereon, or in the alternative to affirm the judgment of the Courts below on the following grounds:

1. The Federal question sought to be reviewed was not timely and properly raised by the Appellant and was not expressly passed on by the courts of Texas.

2. The appeal does not present a substantial Federal question.

## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Whether this Court has jurisdiction to consider an appeal from the Texas Supreme Court, the state's highest court, under circumstances where the constitutional question stems from a decision of the Court of Civil Appeals of the 12th Supreme Judicial District of Texas, an intermediate level appellate court, the appeal from which by writ of error was refused by the Texas Supreme Court with the notation "no reversible error" and where Appellant had first raised a constitutional question on Motion for Rehearing before that tribunal, which Motion was overruled without opinion?

2. Whether the Judgment of the Court of Civil Appeals of the 12th Supreme Judicial District of Texas, pursuant to Rules 301 and 434 of the Texas Rules of Civil Procedure, overruling a denial by the trial court of a timely Motion for Judgment non obstante veredicto and rendering judgment, non obstante veredicto, is a denial of Plaintiff's right to due process?

## COUNTER-STATEMENT OF THE CASE

Appellant's Statement of the Case is significantly inaccurate in a number of instances and appears to be a statement of what Appellant sees the facts to be as opposed to what the record reflects they are. For an accurate, objective and concise statement of the facts of this case, Appellee



refers this Court to the text of the Court of Civil Appeals Opinion which is attached to Appellant's Appendix (App., p. A.4-A.7)

## I. REASON WHY THE APPEAL SHOULD BE DISMISSED

The Federal question sought to be reviewed was not timely and properly raised by the Appellant and was not expressly passed on by the courts of Texas.

Prior to the Texas Supreme Court's refusal to grant Appellant's Writ of Error with a notation "writ ref'd, no reversible error", and prior to his Motion for Rehearing to that Court, Appellant had not raised any Federal constitutional questions. Appellant on page 3 of his Jurisdictional Statement states correctly that he raised the constitutional question for the first time in his Motion for Rehearing after the Texas Supreme Court had refused his Application for Writ of Error. The stated reason of Appellant for not asserting the constitutional point earlier in the State appellate process was Appellant's surprise that the state's highest court would affirm the judgment of the lower appellate court and fail to reverse on a constitutional point which he had never claimed. Appellant is basing his appeal to this Court on the theory that he has a right to demand that the Texas Supreme Court be his advocate and proclaim on its own initiative that Appellant has been denied due process. Under such a theory neither this Appellant nor any other would ever have to assign any point of law as error before an inferior court.

The Supreme Court of the United States has previously ruled that in order to maintain the jurisdiction of the Court because of the denial in a state court of any right claimed under the Constitution of the United States, the record must reflect that such right was specifically set up or claimed at

the proper time and in the proper way. *Texas and Pacific Ry. Co.* v. *Southern Pacific Co.,* 137 U.S. 48 (1890). In the *Texas Pacific Ry. Co.* case, as in the present case, a violation of the constitutional right was not claimed until petition for rehearing after the judgment by the Louisiana Supreme Court. This Court in its opinion held that a violation of a constitutional right is not properly claimed when suggested for the first time in a petition for rehearing after judgment. *Id.* at 54.

Appellant's Application for Writ of Error to the Texas Supreme Court and Motion for Rehearing denied was refused without opinion. (App. A-23).

This Court in *Bowe* v. *Scott,* 233 U.S. 658 (1914), in examining a jurisdictional situation identical to the present case, held that a state court's actions in declining to grant a rehearing without reciting the reasons therefor did not constitute a decision of the Federal question. This Court ruled:

> "It is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking jurisdiction of the Court unless the court below in dealing with the petition for rehearing considers and passes upon the Federal ground therein relied upon . . ." *Id.* at 63.

This Court has consistently reaffirmed the above rule. *Bailey* v. *Anderson,* 326 U.S. 203 (1945); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 128-129 (1945); *Hanson* v. *Denckla,* 357 U.S. 235, 243-244 (1958).

Further, this Court has held that where a state court has failed to pass upon a Federal question, this Court will assume the omission was due to the want of proper presentation in the state court, unless the party raising the question can affirmatively show to the contrary. *Street* v. *New York,* 394 U.S. 576, 582 (1969).



Such an assumption by this Court in the instant case would be appropriate.

The opinion at which Appellant directs his attack is that of the Texas Court of Civil Appeals for the Twelfth Supreme Judicial District. Appellant by his own admission on page 3 of his Jurisdictional Statements did not raise a Federal question in his Motion for Rehearing before that judicial body. Appellant was in no way precluded from raising a Federal question in his Motion for Rehearing Twelfth Court of Civil Appeals. Appellant's failure to raise the question, however, did preclude him from raising a Federal question as grounds for appeal to the Texas Supreme Court.

The Texas Rules of Civil Procedure, Rule 469(e) states that in an appeal from a Court of Civil Appeals decision by application for a writ of error to the Texas Supreme Court the matter complained of must be included as error in the motion for rehearing before the Court of Civil Appeals. That Rule states in part:

> "Whether the matter complained of originated in the trial court or in the Court of Civil Appeals, it must be assigned as error in the motion for rehearing filed in the latter court."

The above Rule is enforced as part of the orderly process of judicial review in the Texas state courts. *Watson* v. *Glen Falls Ins. Co.,* 505 S.W.2d 793 (Tex. 1974); *Lone Star Gas Co.* v. *Shearer,* 157 Tex. 508, 305 S.W. 2d 150 (Tex. 1957); *Texas State Highway Department* v. *Fillmon,* 150 Tex. 460, 242 S.W.2d 172 (Tex. 1951). Appellant seeks to avoid the effect of his failure to raise the question by invoking exceptions to the general rule. The exceptions are that a Constitutional question is not tardily raised on motion for rehearing before the highest state court under either of the following circumstances:

(1) The ruling of the highest state court supplies the basis of the Federal question and the ruling could not have been foreseen. *Herndon* v. *Georgia,* 295 U.S. 441 (1935).

(2) The state's procedural rules preclude raising the issue. *Saunders* v. *Shaw,* 244 U.S. 317 (1917); and *Great Northern R. Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358 (1932).

In the first instance the ruling of the state court which supplies the basis of the Federal question is that of the Court of Civil Appeals — not the state's highest court — and Appellant did not raise a Federal question for the Court of Civil Appeals to consider. Further, Rule 483 of the Texas Rules of Civil Procedure provides in part:

> "Order on Application for writ of error. In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with a docket notation 'Refused'. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the court will deny the application with the notation 'Refused. No Reversible Error'. In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation 'Dismissed for Want of Jurisdiction.' "

Under this Rule there was no mandatory duty on the part of the Texas Supreme Court to grant Appellant's Application of Writ of Error and reverse the decision of the Court of Civil Appeals.



Appellant not only failed to assign a Federal question as error in his Motion for Rehearing before the Court of Civil Appeals, but he failed as well to raise the question in his Application for Writ of Error to the Texas Supreme Court. Nor could he properly have done so. Even so, his failure to try until filing his Motion for Rehearing suggests at least that Appellant was overcome more by oversight than by surprise. It was a foreseeable consequence that the Texas Supreme Court might affirm, without opinion, the decision of the Court of Civil Appeals.

Appellant was legally obligated to anticipate that the Texas Supreme Court would not, of its own motion, rule that Appellant had been denied due process by reason of the decision of the Court of Civil Appeals. Texas Rule of Civil Procedure 434, Federal Statute 28 U.S.C. § 2106 and this Court's decision in *Neely, infra.,* are at least adequate to suggest to Appellant the possibility that the Texas Court would not volunteer in Appellant's behalf a now alleged, but then unsolicited and unclaimed, right of due process.

In the second instance Appellant could have readily preserved any Federal question by following the provisions of Rule 469(e), *supra.* Contra *Saunders, supra,* in the instant case there was no change in the complexion of the case in the Texas Supreme Court which would warrant invocation of the exception. There was no procedural circumstance which inhibited his timely raising the question.

For the foregoing reason, Appellee respectfully submits, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, that this Honorable Court dismiss the above entitled appeal.

## II. THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Appellant has not challenged the constitutionality of Rule 301, Texas Rules of Civil Procedure. He challenges the constitutionality of its application to the present case. Appellant's main constitutional challenge is based upon his contention that the Court of Civil Appeals went beyond its power in reversing the trial court's judgment and rendering judgment non obstante veredicto for Appellee.

The question of whether an appellate court may constitutionally reverse the trial court and render judgment non obstante veredicto under the Federal Rules of Civil Procedure has been directly answered by this Court.

In *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967) this Court held:

> "The question is here whether the Court of Appeals, after reversing the denial of defendant's rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment notwithstanding the verdict than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v."

Appellant complains that the Texas Court of Civil Appeals rendered verdict on its own "finding of fact". This is not the case. There was no question of fact when Appellant Theis admitted under oath that he had committed the very acts for which he had been suspended and later dismissed. Appellant further contends that the Texas Court of Civil Appeals had no authority to set aside the verdict of the jury and substitute its own decision and render judgment that the Plaintiff take nothing under Rule 301 of the Texas Rules of Civil Procedure.



Appellant has overlooked other authority to do just that.

Rule 434 of the Texas Rules of Civil Procedure in exact analogy to the Federal statute, 28 U.S.C. § 2106, states in part as follows:

> "When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of the cases the cause shall be remanded for a new trial . . ."

Appellant's present appeal appears considerably more germane to Rule 434 of the Texas Rules of Civil Procedure since Rule 301 is in Section 11 of the Texas Rules of Civil Procedure which has to do with trial of causes in district and county courts. Rule 434 applies specifically to the Court of Civil Appeals.

Rule 434 of the Texas Rules of Civil Procedures compares closely with its Federal counterpart, 28 U.S.C. § 2106, the constitutionality of which was upheld by this Court in *Neely, supra.*, at 332. The Federal Statute, 28 U.S.C. § 2106 states, in part, as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may . . . direct the entry of such appropriate judgment, decree or order . . . as may be just under the circumstances."

There is no apparent differentiation to be made in the parallel authority under the state rule and federal statute. Application of Rules 301 and 434, *supra.*, to the facts of this case no more violate any provision of the Constitution of the United States than the action of the Court of

Appeals in *Neely, supra.* The Court of Civil Appeals construction of the Texas Rules of Civil Procedure giving it authority to render a decision ordering judgment non obstante veredicto was not a new construction which threatened constitutional rights. The same construction has been properly made by this Court and by the Texas Courts with respect to similar rules of procedure.

For the foregoing reasons we respectfully submit that there is no substantial question raised in this appeal.



## CONCLUSION

For all the foregoing reasons we respectfully submit that Appellant's appeal be dismissed, or in the alternative that the judgment of the courts below be affirmed. We further submit that, should this appeal be regarded as a petition for writ of certiorari, that certiorari be denied.

Respectfully submitted,

JANE MACON
City Attorney
City of San Antonio
City Hall
San Antonio, Texas 78205

ROBERT SAWTELLE

JOHN W. DAVIDSON

RICHARD A. FLUME, JR.

SAWTELLE, GOODE, DAVIDSON & TROILO, A PROFESSIONAL CORPORATION
1100 San Antonio Savings Building
San Antonio, Texas 78205

*Attorneys for the City of San Antonio, Acting by and Through Its Water Works Board of Trustees of San Antonio*

Dated: August 8, 1978

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Appellee's Motion To Dismiss The Appeal From the State Court, or in the Alternative To Affirm The Ruling of the Courts Below was mailed by Certified Mail, Return Receipt Requested, to Mr. Edward V. Dylla, Attorney at Law, D-305 Petroleum Center, 900 N. E. Loop 410, San Antonio, Texas 78209, and Mr. James G. Murry, Attorney at Law, D-305 Petroleum Center, 900 N. E. Loop 410, San Antonio, Texas 78209, Attorneys for Appellant, this 8th day of August, 1978.

Richard A. Flores